Filed 10/11/22 Austin v. Trustees of the Cal. State University CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RONALD AUSTIN, Appellant, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	D078950 (Super. Ct. No. 37-2020-00029114-CU-WM-CTL)

APPEAL from order of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Brent J. Borchert for Appellant.

Susan Westover for Respondent.

I.

INTRODUCTION

This appeal arises from a motion for attorney fees under the California Public Records Act (CPRA or PRA) (Gov. Code, § 6250 et seq.).[1] Ronald

1 Further statutory references are to the Government Code unless noted.

Austin requested a crime victim's name from the wrong office at California State University San Marcos (CSUSM). An employee in that office mistakenly advised Austin that he would have to obtain a subpoena authorizing him to access this information. The next day, Austin filed a CPRA petition in the superior court, despite university counsel's request to Austin's counsel in a prior CPRA matter to contact her for help with any other CPRA requests before filing suit. CSUSM's CPRA coordinator later provided Austin with the victim's name, and the superior court denied his petition as moot. The court denied Austin's motion for attorney fees, finding that his petition did not cause the disclosure and that he thus had not prevailed within the meaning of the CPRA.

On appeal, Austin asserts that his lawsuit did cause the disclosure and that the superior court erred in denying him attorney fees. CSU contends that the record contains sufficient evidence to support the court's decision. We conclude that Austin does not establish a lack of substantial evidence for the order denying attorney fees, and we therefore affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *California Public Records Act request and petition*

Austin sent an e-mail to Kristin Erickson, the assistant to the Chief of Police at CSUSM on August 18, 2020, at 12:23 a.m., stating, "Hello, [I] have a public records request. [¶] On February 19, 2020, a battery occurred on the CSU San Marcos campus. [P]lease email me the victim's name."

Later that morning, Erickson forwarded Austin's e-mail to Zulema Caudill, the records coordinator in the CSUSM Police Department. Erickson's e-mail stated, "Please see below." At around 12:30 p.m., Caudill responded to Austin and stated in relevant part, "The law requires law

enforcement to provide information the public has the right to know and needs to know, however, at the same time law enforcement must withhold information if the release would jeopardize an individual's right to privacy. Because of this, in order for our agency to provide you the name of the victim in this case we would need you to acquire a subpoena from court authorizing you for this specific information."

The next day, August 19, Austin's attorney, Brent J. Borchert, filed a verified petition for writ of mandate on Austin's behalf in the superior court, alleging that CSUSM had denied the CPRA request. Austin's verification and Borchert's signature on the petition were both dated August 18. CSU filed an answer to the petition on October 28, noting that it had erroneously been sued as CSUSM.

On December 23, Borchert e-mailed a notice of hearing for February 5, 2021, and a hearing brief to CSU counsel Susan Westover. The brief was supported by Austin's declaration, which attached his e-mail communication with Erickson and Caudill.

Candace Bebee sent Austin a letter by e-mail on January 22, 2021. She identified herself as the CPRA Coordinator for CSUSM. She stated that CSUSM has a "robust process for responding to CPRA requests" and that their website "provides detailed information to the public on how to make a CPRA request to the campus . . . ." Bebee also provided an address for the website. She explained that Austin "never submitted a CPRA request to us using our publicly posted process," and that neither the University Police Department, nor that department's records coordinator, is charged with responding to CPRA requests. Bebee then summarized Austin's communications with Erickson and Caudill and noted that Austin never contacted the University Police Department again and that he never

contacted Bebee's office. She stated, "Had you or your counsel contacted me or the Office of General Counsel, we would have provided you with the information that you requested, just like we have done for other requests for victim names." Bebee concluded by providing the requested victim's name.

CSU filed its hearing brief on January 25, arguing in part that Austin's petition was moot. Erickson, Caudill, and Bebee provided declarations describing the foregoing events. Bebee's declaration attached her letter to Austin and stated that she had provided him with a "further response to his misdirected CPRA request." She explained that if he had contacted her "with his CPRA request for the name of a crime victim," she "would have timely and properly responded to such a request, as [she] [had] done in response to other requests." Bebee described a January 2020 CPRA request for the name of the victim of a cell phone theft, indicating that she provided the name less than two days later and attaching copies of that e-mail correspondence. Bebee's declaration also attached the CSUSM website page for "Public Records Requests," which identified her as "Campus Coordinator" for public records requests and listed her e-mail address.

CSU attorney Westover also submitted a declaration. She stated that Austin and his counsel had filed three previous CPRA petitions against CSU. When they settled an action involving CSU Long Beach in January 2020, Westover sent an e-mail to Borchert that stated in part, "If Mr. Austin has any other PRA requests that he believes were improperly denied, please let me know before filing suit, so we can save both sides (and the court) time and money. If an error was made, we can easily fix it without resorting to litigation." Borchert responded, in part, "If I have any other cases come up in the future I will contact you first. You might want to set up a portal for CPRA requests to the university and have a knowledgeable person

responding." Westover stated in her declaration that Borchert did not contact her before filing the petition in the CSUSM matter.

The superior court denied Austin's writ petition as moot and entered judgment for CSU.

B. *Attorney fees proceedings*

Austin moved for CPRA attorney fees and supported his motion with a declaration from Borchert that attached billing statements and the Bebee letter. Austin argued that he was the prevailing party because CSU purportedly could not "claim that its disclosure . . . was not motivated by his lawsuit." He maintained that neither the website with CPRA information, nor the timing of his petition, established otherwise. CSU opposed the fee motion, and supported its opposition with declarations from Erickson, Caudill, and Bebee, and an expanded declaration from Westover. Bebee again stated that she would have provided the victim's name if Austin had contacted her, and Westover again stated that Borchert had not reached out to her before filing the petition. Austin filed a reply brief, without additional supporting declarations.

The superior court heard the fee motion in an unreported hearing. The previous day, the court had issued a tentative ruling, in which it summarized the law applicable to CPRA fee requests, citing *Sukumar v. City of San Diego* (2017) 14 Cal.App.5th 451 (*Sukamar*). The court explained that to be a prevailing party within the meaning of the CPRA, a plaintiff does not have to have obtained a favorable final judgment, but must show that the "lawsuit spurred [the defendant] to act or was a catalyst speeding [the defendant's] response," and that the key is " 'whether there is a substantial causal relationship between the lawsuit and the delivery of the information.' " The court then found:

> "In this case, the evidence submitted with the opposition demonstrates that litigation was not the motivating factor prompting a compliant response to the PRA request. Specifically, the declaration of Candace Bebee explains that the University routinely provides crime victim information in response to similar requests. The University would have initially provided the information if the request had been submitted through correct channels (as set forth on the University's web page). The motivating factor prompting the second response to the request was not this litigation, but instead was the proper routing of the subject PRA request. This action was filed [the] day after the PRA request was initially denied, such that Respondent was not afforded the ability to correct its initial response prior to initiation of this lawsuit. This resulted in temporal proximity, but was not the motivating factor."

In the superior court's minute order after the hearing, the court stated that "having fully considered the arguments of all parties, both written and oral, as well as the evidence presented," it was denying the motion, and that the discussion that followed was "intended to supplement and clarify, but . . . not supersede the tentative (now confirmed) ruling." The court explained:

> "As stated during oral argument, the initial email from Zulema Caudill dated August 18, 2020 denied the request and erroneously instructed Petitioner 'to acquire a subpoena from court authorizing you for this specific information.' On the other hand, Petitioner previously filed a nearly identical lawsuit challenging a PRA denial at Cal. State Long Beach. After reaching a preliminary settlement of the Long Beach case, attorney Westover transmitted an email to attorney Borchert dated January 8, 2020."

After setting forth the relevant portion of the Westover e-mail, as described above, the court continued:

> "Petitioner cannot reasonably rely on the August 18, 2020 email as justification for filing the present action given the previous email imploring him to contact CSU counsel regarding other PRA requests. Petitioner's counsel was clearly informed and cognizant

> of the correct channels to utilize to address outstanding PRA requests. It appears reasonable to presume Petitioner knew what procedures to employ other than initiating litigation."

Austin timely appealed. He elected to proceed with a record consisting of only a clerk's transcript.[2]

III.

DISCUSSION

A. *Applicable law*

1. *California Public Records Act*

"The CPRA was modeled on the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552 et seq.) and was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425.)

Under section 6253, a public agency "shall, within 10 days from receipt of the request, determine whether the request . . . seeks copies of disclosable public records in the possession of the agency and . . promptly notify the person making the request of the determination and the reasons therefor." (§ 6253, subd. (c).) Nonexempt records shall be made "promptly available . . . upon payment of fees . . . ." (*Id.*, subd. (b).) The CPRA generally "does not specify when records must be produced to a requesting party." (*Motorola*

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[2] CSU contends that the superior court's decision is presumed correct in the absence of a reporter's transcript. Although an appellant who "supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992), there is no indication in the court's minute order that additional evidence was offered by the parties at the attorney fees hearing. Under the circumstances, the lack of a reporter's transcript neither impedes our review, nor compels affirmance.

Communication & Electronics, Inc. v. Department of General Services (1997) 55 Cal.App.4th 1340, 1349 (*Motorola*).)

"Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records." (§ 6258.)

2. *Attorney Fees under CPRA*

Under the CPRA, a "court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section." (§ 6259, subd. (d).) Neither section 6259, nor the remainder of the CPRA, defines "prevail." (See § 6250, et seq.)

It is well settled that a plaintiff "prevail[s] within the meaning of [the CPRA] when [the plaintiff] files an action which results in [the] defendant releasing a copy of a previously withheld document." (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 898 (*Belth*); *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1088 (*Galbiso*) ["[T]he standard test for determining if a plaintiff has prevailed under the [CRPA] is whether or not the litigation caused a previously withheld document to be released"]; *Pacific Merchant Shipping Assn. v. Board of Pilot Commissioners etc.* (2015) 242 Cal.App.4th 1043, 1053 (*Pacific*) ["This has become the ' "standard test" ' of whether a plaintiff is the prevailing party in a CPRA action"].)

A " 'plaintiff need not achieve a favorable final judgment in order to be a successful party. A defendant's voluntary action induced by plaintiff's lawsuit will still support an attorneys' fee award on the rationale that the lawsuit spurred defendant to act or was a catalyst speeding defendant's response.' [Citation.] 'The critical fact is the impact of the action, not the manner of its resolution.' " (*Belth, supra*, 232 Cal.App.3d at p. 901.)

In *Sukamar*, this Court elaborated on the role of causation in the CPRA prevailing party analysis:

> "The question whether the plaintiff prevailed, in the absence of a final judgment in his or her favor, is really a question of causation—the litigation must have resulted in the release of records that would not otherwise have been released. [¶] However, a PRA plaintiff does not qualify as a prevailing party merely because the defendant disclosed records sometime after the PRA action was filed. There must be more than a mere temporal connection between the filing of litigation to compel production of records under the PRA and the production of those records. The litigation must have been the motivating factor for the production of documents. [Citations.] The key is whether there is a substantial causal relationship between the lawsuit and the delivery of the information." (*Sukamar, supra*, 14 Cal.App.5th at p. 464.)

3. *Standard of review*

"A trial court's exercise of discretion concerning an award of attorney fees will not be reversed unless there is a manifest abuse of discretion." (*Galbiso, supra*, 167 Cal.App.4th at p. 1077.) "When two or more inferences can reasonably be deduced from the evidence, the reviewing court has no authority to substitute its decision for that of the trial court. [Citation.] 'In this connection we employ the equivalent of the substantial evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences.' " (*Id.* at p. 1078.)

"A court's ruling on the issue whether a plaintiff is a prevailing party under Government Code section 6259, subdivision (d)—the PRA—is a factual determination reviewed under the substantial evidence standard. [Citations.] Numerous courts have applied this review standard to the issue of whether a plaintiff's lawsuit caused the production of public records. [Citation.] Courts have recognized that this causation question is an

intensely factual and pragmatic one, frequently requiring courts to go outside the merits of the precise underlying dispute and focus on the condition that the fee claimant sought to change. [Citation.] An appellate court must defer to the trial court's determinations on the causation issue, unless there is no evidence to support the trial court's factual conclusion." (*Pasadena Police Officers Assn. v. City of Pasadena* (2018) 22 Cal.App.5th 147, 167; see *Galbiso, supra*, 167 Cal.App.4th at p. 1085 [" 'Cases denying attorney fees . . . have done so because substantial evidence supported a finding that the "litigation did *not* cause the [agency] to disclose any of the documents ultimately made available" ' "].)

Austin maintains that our review is de novo. He contends that the "facts are not in dispute," because the "timeline of disclosure is clear," and also suggests that the issue before us involves "statutory construction and a question of law." Neither argument passes muster. The factual issue here is not the timeline, but rather, CSU's motivation for disclosure, which is disputed. Although statutory interpretation and legal issues are subject to de novo review (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332), Austin does not establish that such issues exist here. To the contrary, as discussed *ante*, the test for determining whether a party prevailed within the meaning of the CPRA, for purposes of a fee award, is well-settled and involves questions of fact. (*Belth, supra*, 232 Cal.App.3d at p. 898; see *Galbiso, supra*, 167 Cal.App.4th at pp. 1085, 1088; *Pacific, supra*, 242 Cal.App.4th at p. 1053.)

B. *Substantial evidence supports the fee order*

We conclude that substantial evidence supports the superior court's order. Citing Bebee's declaration, the court found that the "motivating factor prompting [her] response to [Austin's] request was not this litigation, but

instead was the proper routing of the subject PRA request." The court found that Austin's filing of the lawsuit one day after his request meant that CSU "was not afforded the ability to correct its initial response" (i.e., so that while the lawsuit "resulted in temporal proximity," it was "not the motivating factor" for disclosure). The court further found that Austin also could not rely on his CPRA request to justify the lawsuit, given the previous e-mail communication from CSU counsel to Austin's counsel, because it was "reasonable to presume [Austin] knew what procedures to employ other than initiating litigation."

The record supports these findings. First, Bebee's uncontradicted declarations established that CSUSM has a website regarding public records requests, with her name and e-mail address listed; she would have supplied the victim's name if Austin had directed his request to her; and she did give a further response to his misdirected request. The declarations further showed that Bebee responded to a CPRA request for a crime victim's name in under two days, several months before Austin's request. The court could reasonably find that she responded to Austin's request after it was properly routed (i.e., to her) and not because of his lawsuit.

Austin maintains that CSU disclosed the victim's name because of his lawsuit, after CSU attorneys had time to "review the case and conclude that the CPRA required disclosure." He states that CSU waited months, until shortly before trial, and that his use of an incorrect e-mail address "would have resulted in only a short delay," once his "request ma[de] its way" to her. We are not persuaded. Austin does not dispute that Bebee previously responded promptly to a similar, properly routed, request. Nor does Austin cite any evidence that CPRA requests can be rerouted quickly at CSUSM. (See *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1267

[reviewing court is "entitled to disregard . . . unsupported factual assertions"].) Ultimately, Austin is asking us to reweigh the superior court's implied finding that Bebee was credible, which we cannot do. (*Galbiso, supra*, 167 Cal.App.4th at p. 1078; cf. *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 481-482 [denying CPRA fees where superior court "impliedly determined" petitioner did not prevail and the finding was "supported by substantial evidence," notwithstanding that "there may have been conflicting evidence and inferences available"].)

Second, the record also supports the superior court's related findings that, in substance, temporal proximity did not support Austin's showing, and that the prior communications between CSU's counsel and Austin's counsel further undermined it. Austin's attorney, Borchert, had filed three prior CPRA actions against CSU on Austin's behalf. After one of those lawsuits was resolved, Westover asked Borchert to contact her on CPRA issues before filing suit and Borchert said that he would do so. These facts support two inferences: first, by the time Austin sent his CPRA request to CSUSM, he knew or should have known how to properly submit such a request to a CSU entity, and second, if something went awry—such as an incorrect office sending an erroneous denial, as here—Borchert knew that he could contact CSU's counsel for help. Yet, Austin filed his petition just one day after receiving the initial, erroneous response. This approach created temporal proximity, in that CSU's disclosure postdated the lawsuit, but the approach also rendered that proximity meaningless. CSU was afforded no real opportunity to resolve Austin's CPRA request before the lawsuit was filed. (*Sukamar, supra*, 14 Cal.App.5th at p. 464 [there "must be more than a mere temporal connection"]; see *Motorola, supra,* 55 Cal.App.4th at pp. 1344-1345, 1451 [affirming denial of CPRA fees, where agency provided evidence of

"uncertainty over the scope of the request and administrative difficulties"; explaining that "[m]ore than *post hoc, ergo propter hoc* must be demonstrated"].)[3]

Austin again disagrees. He insists that "[t]here is nothing in the record to suggest that [he] ever would have received the requested information if he had not filed this lawsuit." To the contrary, Bebee's and Westover's uncontradicted declarations established that Austin could have obtained the victim's name without filing a lawsuit by sending his request to the correct office at CSU, or by having his attorney ask Westover for assistance. (Cf. *Motorola, supra*, 55 Cal.App.4th at p. 1351 ["In one sense, all public record disclosures are made because otherwise a lawsuit might be filed. The critical question is whether the requesting party was required to follow through with the implicit threat of a suit in order to obtain the documents. Here, as the record amply demonstrates, Motorola was not required to do so"].)

Austin's remaining arguments do not compel a different result.

Austin contends that the "real issue" is "whether [CSU's] failure to disclose . . . earlier" was excused because he contacted the police department's records coordinator, rather than the university's CPRA coordinator. He proceeds to speculate that police departments "surely receive[ ] frequent CPRA requests," and that it is the agency's duty to ensure

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3 "The logical fallacy of *post hoc ergo propter hoc* assumes one event is the cause of another merely because the first event precedes the other." (*Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1020, fn. 17.) We recognize that five months elapsed between Austin's petition and Bebee's disclosure. However, on substantial evidence review, we cannot assume, contrary to the superior court's ruling, that the timing of the disclosure was related to Austin's lawsuit. (See *Galbiso, supra*, 167 Cal.App.4th at p. 1078.)

that the record coordinator is familiar with CPRA or can reroute requests. But the issue is not why CSU denied Austin's initial request, or its responsibilities under CPRA generally. The only question before us is whether substantial evidence supports the superior court's finding that Austin's lawsuit did not motivate CSU's disclosure. For the reasons discussed above, we conclude that it does.

Finally, Austin attempts to rely on public policy, asserting that the purpose of CPRA attorney fees is to incentivize the public to pursue judicial enforcement, and that letting agencies "unilaterally neutralize" these "incentives by mooting a fee motion through CPRA compliance would essentially render the fee provision . . . meaningless." In turn, he claims that to uphold the order here would encourage agencies to take a "wait and see" approach to compliance and discourage the public from pursuing meritorious claims.

We do not see how a hasty lawsuit—filed before an entity can properly address a misdirected request or provide assistance through counsel—advances CPRA enforcement or promotes access to public records generally. Nor do we share Austin's concern about "neutralizing . . . incentives." As noted, an award of CPRA attorney fees does not require a judgment in the plaintiff's favor, and a defendant that is genuinely uncooperative, or that concedes that the litigation spurred disclosure, would remain subject to a fee award against it. (See, e.g., *Sukumar*, *supra*, 14 Cal.App.5th at pp. 454, 465 [reversing order denying CPRA fees, after petition was denied following production of all responsive documents; defendant claimed it had produced "everything," before later disclosing more materials during court-ordered depositions]; *Belth*, *supra,* 232 Cal.App.3d at p. 902 [reversing denial of CPRA fees; it was "undisputed that [defendant] took this initiative [to

disclose the documents] in response to, and in hopes of resolving this litigation"].)[4]

We conclude that substantial evidence supports the superior court's finding that Austin was not a prevailing party and that he was therefore not entitled to an award of attorney fees.

DISPOSITION

The order denying attorney fees is affirmed. CSU shall recover its costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.

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[4] Because we conclude that Austin does not establish grounds for reversal, we need not and do not reach CSUSM's alternative argument that we could affirm based on a heightened catalyst standard.